# Mascon Sdn Bhd v Kasawa (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO D8–28–25 OF 2000
ABDUL HAMID MOHAMAD J
17 JULY 2000

***Companies and Corporations*** — *Winding up — Disputed debt — Sum claimed subject to adjudication — Amount claimed huge — Whether company should be wound up — Companies Act 1965 s 218*

The petitioner was employed by the respondent to build a six-storey business and entertainment centre in Melaka for a sum of RM56,900. Despite the interim certificates issued by the architects upon the progressive completion of the development, the respondent failed to pay the petitioner. Although a s 218 notice was served on the respondent at its registered address, the respondent still failed to pay. The petitioner prayed that as the respondent was unable to pay its debts, the respondent be wound up. The respondent opposed the application, alleging that the sum claimed was still subject to adjudication.

**Held**, granting the winding up order as well as other consequential orders prayed for:

Although the respondent alleged that the sum being claimed was arbitrary, he had failed to show what the correct figure should be. If the amount stated was wrongly claimed, considering the debt claimed was more than RM4.7m and the balance was still many times over the RM500 minimum provided by law, it is legitimate to look at whether or not the company is unable to pay its debt (see p 846D–E); *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 followed. Also, although the petitioner had complied with the requirements in s 218, the respondent had failed to prove on a balance of probabilities that there was a bona fide dispute as to the amount claimed and that it was able to pay its debt (see p 846E-F).

**[Bahasa Malaysia summary**

Pempetisyen telah diupah oleh responden untuk membina sebuah pusat perniagaan dan hiburan enam tingkat di Melaka bagi jumlah RM56,900. Meskipun sijil-sijil sementara telah dikeluarkan oleh akitek-akitek pada penyempurnaan progresif pembangunan tersebut, responden gagal membayar pempetisyen. Walaupun notis s 218 telah disampaikan pada responden pada alamat berdaftarnya, responden tetap gagal membayar. Pempetisyen tersebut memohon agar, oleh kerana responden tidak mampu membayar hutang, responden patut digulungkan. Responden menentang permohonan tersebut, dan menuduh bahawa jumlah yang dituntut masih tertakluk kepada penghakiman.

**Diputuskan,** membenarkan perintah penggulungan serta perintah-perintah berbangkit lain yang dipohon: A

Walaupun responden menuduh bahawa jumlah yang dituntut dihitung sembarangan, beliau gagal membuktikan apa jumlah yang betul. Sekiranya jumlah yang dinyatakan tersebut salah, memandangkan hutang yang dituntut tersebut melampaui RM4.7juta dan bakinya berkali ganda lebih daripada RM500 minima yang diperuntukkan oleh undang-undang, adalah sah untuk menentukkan sama ada syarikat tersebut tidak mampu membayar hutangnya (lihat ms 846D–E); *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 diikut. Tambahan pula, walaupun pempetisyen telah mematuhi kehendak-kehendak s 218, responden gagal membuktikan pada imbangan kebarangkalian bahawa wujudnya pertikaian bona fide atas jumlah yang dituntut dan bahawa ia mampu membayar hutangnya (lihat ms 846E–F).] B C

**Notes** D

For cases on disputed debt, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 800–806.

**Cases referred to**

*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 (refd) E

*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 (refd)

*Usahabina v Anuar bin Yahya* [1998] 2 AMR 1370 (refd)

*YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 (refd) F

**Legislation referred to**

Companies Act 1965 s 218

*J Appukuttan* (*SK Yeoh & Jeganathan*) for the petitioner. G

*Aerrene Eng Tiong Mei* (*Jal & Lim*) for the respondent.

**Abdul Hamid Mohamad J**: This is a winding up petition under s 218 of the Companies Act 1965 ('the Act'). The ground is that the respondent is insolvent and unable to pay its debt. The debt is not a judgment debt.

According to the petitioner, pursuant to a letter of award dated 15 December 1995 and a building contract dated 5 September 1996, the respondent employed the petitioner to build a six-storey business and entertainment centre in Malacca for the sum of RM56,900,000. Among the terms of the contract are: H

(a) the respondent shall pay the petitioner progressively against the presentation of progressive certificates issued by the respondent's architect; I

(b) such progressive payments shall be made within thirty days after the presentation of the interim certificates;

(c) the respondent will retain as trustee a sum of RM2,845,000 until completion of the development;

(d) upon the issuance by the architect of a certificate of practical completion, the architect shall issue a certificate for the release of part of the retention sum and the balance will be retained until the expiration of the defect liability period.

The architect had issued the interim certificates upon the progressive completion of the development. However, the respondent has failed to pay the petitioner on the interim certificates presented to the respondent. The petitioner says that the respondent is indebted to the petitioner the undisputed sum of RM4,734,255.94. That amount does not include other sums which the petitioner claims to be due to the petitioner from the respondent.

Section 218 of the notice was served on 4 October 1999 at the respondent's registered address. The respondent has failed to pay the sum demanded. The petitioner says that the respondent is unable to pay its debt. The petitioner prays that the respondent be wound up and for the consequential orders.

The respondent filled an affidavit in opposition. The respondent says that the petition is premature. The main reasons are:

(a) the petitioner should terminate the contract and refer the dispute to arbitration; and

(b) the sum claimed by the petitioner is still subject to adjudication. In other words, it is still not final, in particular, regarding the liquidated ascertained damages (LAD), retention sum and deduction of RM10,000 made by the petitioner to Palmac Plumbing and Construction Co.

Under s 218 of the Act, a company is deemed to be unable to pay its debt if a creditor to whom the company is indebted in the sum exceeding RM500 has served a demand to the company requiring the company to pay the sum due and the company has for three weeks thereafter neglected to pay the sum.

The petitioner has complied with the requirements of s 218 the Act. It is then for the respondent to prove that it is able to pay its debt. In order to rebut the presumption, the respondent is required to prove on the balance of probabilities that there is a bona fide dispute to the sum claimed or that the respondent is able to pay its debt. See *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 (SC).

The respondent says that the petitioner should have terminated the contract and referred the dispute to arbitration. In this respect, cl 26 of the contract reads:

> Without prejudice to any other rights and remedies which the contractor may possess, if ... .

> ... the contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the contractor under the ...

It is clear that the petitioner has a choice whether or not to terminate the contract or to claim for any unpaid sum.

The next issue is whether there is a bona fide dispute of the sum claimed. The amount is the total amount contained in the interim certificates Nos 1-17 issued by the respondent's architect. In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 at p 81 the Supreme Court quoted with approval from the book *Building Contracts* (4th Ed) by the Donald Keating at p 279 that a certificate by a defendants' (in that case) architect or engineer is 'a special and formal kind of admission'.

Augustine Paul JC (as he then was) in *Usahabina v Anuar bin Yahya* [1998] 2 AMR 1370 at p 1399 said:

> The law that I have adverted to makes it clear that if the defendant wished to dispute the amounts stated in the two certificates he ought to have asked the architect to make appropriate adjustments in another certificate or take the dispute to arbitration both of which he did not do.

It is the same here. All that the respondent does and in this petition, is to say that the sum is arbitrary. He has failed to show what the correct figure should be. It is true that the respondent mentions the sum of RM10,000.50 which the respondent alleged to have been wrongly deducted. This again is a bare allegation. Anyway, even if that amount is wrongly claimed (there is no evidence that it is) considering the debt claimed is more than RM4.7m, the balance is still many times over the RM500 minimum provided by law. In *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 the Court of Appeal held that even if the notice overstated the amount owing, it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.

The respondent has failed to show that there is a bona fide dispute as to the amount claimed or that it is able to pay the debt.

In the circumstances, I made the winding up order as well as other consequential orders prayed for.

*Winding up order granted.*

Reported by Anitha Raman